

VERMONT TRANSPORTATION BOARD MEETING JULY 26, 2018

Board Members Present:

David Coen, term expires 2/28/21
T. Faith Terry, term expires 2/28/19
Tim Hayward, term expires 2/28/2020
Richard Bailey, term expires 2/28/21
Vanessa Kittell, term expires 2/28/19
Wendy Harrison, term expires 2/28/19

Board Members Absent:

David Markowski, term expires 2/28/21

Others Present:

John Zicconi, Board Executive Secretary
Ron Shems, Board Attorney
Jenny Ronis, Vermont Assistant Attorney General
Florence Smith, Vermont Legal Assistant
Doug Cote, Claimant (by phone)
Robert Faley, VTrans Maintenance District Administrator

Call to Order:

Chair David Coen called the Thursday, July 26, 2018 meeting to order at 9:15 a.m., which was held in Conference Room R235 at the Dewey Building at 1 National Life Drive in Montpelier, VT.

1. NEW BUSINESS

1.1 Review/Approve Minutes of the June 6, 2018 Meeting.

On a motion by Ms. Terry seconded by Mr. Bailey, the Board unanimously voted to approve the minutes of the June 6, 2018 Board meeting with corrections.

1.2 TB-466 Cote Small Claim

Mr. Cote told the Board he was traveling north on Route 100 in the Town of Dover when he hit a pothole that blew out both passenger-side tires and cracked an axle cap. As a result, he and his family ended up stuck in Vermont for seven days. After doing research, he determined that this pothole was an ongoing condition throughout the winter. He spoke to both the town clerk and a police officer who told him that a pothole along this stretch of road was a continuing problem. He said there was no warning signage or cones along the road when he hit the pothole, but afterwards a road crew erect a warning sign. Had such a sign been there the day he had his accident, he believes his accident would not have occurred.

Mr. Cote said the fallout from his accident was expensive as he and his family had to stay in Vermont and pay for a rental car, meals and lodging expenses, but that he is not seeking reimbursement for such

expenses. He is only seeking reimbursement for the expenses directly related to the damage to his vehicle.

Ms. Kittell asked Mr. Cote what he meant by saying this stretch of roadway was a problem all winter and how does he know that? Mr. Cote said he submitted a notarized letter from Town Clerk Andrew McLean stating such, and that after his accident he spoke to the owner of a nearby inn and the innkeeper told him he was the eighth car that pulled into his property that week that had been damaged by the pothole. He also received an email from police officer Sam Morris who indicated the pothole had been an ongoing problem as he had responded to other, similar calls.

Ms. Terry asked if the Board had received a copy of Mr. Morris' email. Mr. Zicconi said he had not received such an email. Mr. Cote said he did not submit the email. Mr. Cote said once the officer found out that he was bringing a damage claim before the Board, the officer indicated to him that he did not want to get involved. Mr. Cote said his family has friends who live in the area and they also indicated that this section of roadway has had continuing problems during the winter.

Mr. Coen told Mr. Cote that whether the officer wanted to get involved or not that if he had a copy of the referenced email that he would like to see it. Mr. Cote said he would forward a copy of the email to Mr. Zicconi.

Mr. Hayward asked Mr. Cote how he knew that all the people he mentioned were referencing the same pothole? Mr. Cote said his determination was based on the fact that everyone said the pothole was located just north of the Deerfield Valley Inn and that Town Clerk Andrew McLean had said that this particular pothole had been a continuing problem.

Mr. Bailey asked if there was a police report? Mr. Cote said there probably was, but that he did not submit one to the Board. Mr. Coen asked if that could be submitted? Mr. Cote said he would try to do that. Mr. Bailey asked what the speed limit was along that stretch of roadway. Mr. Cote said probably 30 mph, but he did not know that for a fact. Ms. Kittell asked how fast he was traveling when he hit the pothole? Mr. Cote said there were other cars traveling along the road at the time and he was probably going 25 mph. He said he would refute any notion that he was speeding.

Ms. Ronis asked Mr. Cote how he got the letter from the town clerk? Mr. Cote said when he knew that making a claim was going to be necessary, he went to the town clerk and he was told "this has been going on all winter." He was told that VTrans was sent letters and petitions from the Town of Dover and its residents complaining about the condition of the roadway.

Ms. Ronis said the letters and petitions were dated Feb 20 and March 14, which are both after Mr. Cote's accident, which took place on January 23. She asked Mr. Cote if he had any evidence the state was notified of a dangerous pothole prior to January 23? Mr. Cote said that the highway maintenance records that he submitted, the DWRs, show that crews the week before his accident were working in the area repairing potholes. Those DWRs are dated January 16 and January 24, the day after his accident. Ms. Ronis asked if Mr. Cote knew whether the pothole that he hit appeared in between January 16 and

January 23? Mr. Cote said the pothole was really deep and it felt like his vehicle hit a wall. It was a serious pothole that after hitting it made his three-year old scream. It was not a small bump in the road. He said the roadway should have been marked for a hazard, but it was not. He said with such a warning his accident could have been prevented.

Mr. Bailey asked if Mr. Cote had photos of the pothole? Mr. Cote said he did take photos the next day and that he would forward them to the Board.

Ms. Ronis asked Mr. Cote if there is anything in the email chain he had with police officer Morris that indicates the pothole that he hit was reported to authorities prior to his accident on January 23? Mr. Cote said his assumption is that it was, and he based that assumption on the reaction Officer Morris had at the time of his accident as well as a verbal conversation they had where the officer indicated the pothole had been a problem prior to his accident. Mr. Cote also mentioned that the innkeeper told him he was one of eight cars that week that had hit the pothole and turned into his property afterward. Ms. Ronis asked Mr. Cote if he attempted to get a formal statement from the innkeeper? Mr. Cote said no.

Ms. Ronis said she objected to the submission of the town clerk's letter as there is no evidence from the letter that there was notice of the pothole prior to January 23. She then called Robert Faley, VTrans District 1 and District 3 Administrator, as a witness. Ms. Ronis asked Mr. Faley if he was familiar with the condition of Route 100 through Dover during the winter. He said yes. She asked how he would describe that condition. He said the pavement is rapidly deteriorating. She asked if Route 100 in that area is scheduled for repair? He said yes, they have accelerated a paving project that was originally scheduled for 2020 to next summer, and this summer VTrans will do a \$150,000 spot leveling repair.

Ms. Ronis asked Mr. Faley if he was familiar with Mr. Cote's accident? He said he was. She asked if he received any reports of such a pothole prior to January 23? He said the first complaint he received was on January 25. On that day, he said he received three complaints. One was from the Wilmington Town Administrator, the other two were from motorists.

Ms. Kittell asked Mr. Faley what these complaints regarded, and from what dates they were regarding? Mr. Faley said two were just the general condition of the pavement, one was a blown tire. He did not know the date of the blown tire. He also received a complaint on January 30 that referenced a January 23rd blown tire. He said that complaint was from a citizen. Mr. Coen asked if he received any reports from the State Police? Mr. Cote said no.

Mr. Cote said the DWR from January 16 indicates work to patch potholes with cold patch on Route 100 from mile marker 3.2 in Wilmington to mile marker 2.0 in Dover, which includes the area near the Deerfield Valley Inn. The Deerfield Inn is at approximately mile marker 1.1 in Dover. The January 24th DWR is also for pothole work in the area of the Deerfield Valley Inn. Ms. Ronis asked Mr. Faley why VTrans patched the same area several times? He said the pavement in the area was deteriorating. Crews were out plowing numerous times during this time span and the potholes were reappearing. Ms. Ronis asked how quickly potholes can appear on Route 100? He said if it was a preexisting pothole that had already been patched that all it would take is a freeze/thaw cycle or possibly plowing the road during a

winter-storm event and the pothole could be back the very next day. He said potholes can develop overnight. Heavy traffic also will accelerate the development of potholes, he said.

Mr. Faley said road crews during this stretch of time were out dealing with snow or ice everyday but January 19. Ms. Ronis asked how Mr. Faley prioritizes the work that has to be done in his district? He said winter maintenance is their #1 priority, second highest priority is patching potholes because it is a safety issue and that it is important to have sufficient movement of vehicles on the roadways. Ms. Ronis asked if there were no DWRs for pothole patching between Jan. 16 and Jan. 24 if that meant crews were out doing other activities? He said yes. Every day during that stretch crews were out plowing snow, sanding and salting roads and getting trucks that needed repair up and running for the next winter event.

Mr. Coen said he understood that crews could not patch potholes every day, and asked if there are times that crews mark potholes or post a sign warning about potholes? Mr. Faley said they typically don't do that. He said if there is something that was so severe that it needed a warning that they instead would patch it.

Ms. Terry referenced the letter from the Town Clerk and asked Mr. Faley to respond. Mr. Faley said during the winter months the asphalt plants are closed so VTrans' ability to repair roads are limited. One method is to use cold patch, which they place in the hole and push it down with the tires of the truck. This patches the hole but if a little water gets in the hole and there is a freeze/thaw cycle traffic tires will roll over it and often suck the cold patch out of the hole. Thus the patch is very temporary. The district also has an asphalt recycling machine that mixes used asphalt with an emulsion that gets heated to about 300 degrees. He said using this warm patch is a little better than using cold patch, but it is not a permanent fix. A permanent fix can only be achieved after the asphalt plants open in the warmer months, typically in April. As a result, every patch done during the winter is temporary, he said.

Ms. Terry said given the repeated deterioration of this stretch of road, why were there no warning signs posted? Mr. Faley said he believed there were signs posted at one time, but he believes they were focused along Route 100 in Wilmington, not the Dover area as the southbound lanes in Wilmington were more severely deteriorated than the roadway sections in Dover. Mr. Cote said VTrans posted a sign in the Dover area the day after his accident. Ms. Ronis asked Mr. Faley if VTrans creates DWR entries for posting signs. Mr. Faley said it does not.

Ms. Ronis said the state has sovereign immunity to prioritize roadway maintenance. As a result, a poor condition of roadway cannot be the basis of Mr. Cote's claim. The Board, she said, is empowered to hear claims of negligence, but to show negligence Mr. Cote would have to establish prior notice of an issue plus a reasonable opportunity to respond. In this case, she said, there is no evidence of notice prior to Mr. Cote's accident, and even so the daily work reports show District forces were out and about patching the next day after Mr. Cote's accident. As a result, Mr. Cote can neither show notice nor that VTrans responded in an unreasonable amount of time. She said while the state is sorry for his accident, the state does not believe it is liable for the damages done to Mr. Cote's vehicle.

Mr. Coen said the Board will take into advisement the objection VTrans had to the Town Clerk's letter. He also provided both parties seven days to file additional material or information with the Board.

1.3 Executive Secretary Report

There was no report.

2. OLD BUSINESS

2.1 Transportation Rule Review

The Agency of Transportation during the spring contacted the Board and asked that all administrative rules be reviewed to make a determination of whether the rule should be retained, modified or repealed. The Agency's goal is to modernize all rules so that anything remaining in place is both necessary and functional in today's society. The first phase of the initiative is to identify rules that are outdated and can be repealed.

Please remember that VTrans contacted me to let the Board know that the Agency would like to undertake an evaluation of all of the state's administrative rules related to Transportation, of which there are almost 100. Twenty-one of these rules relate to the Board. The Agency's goal is to determine which rules, if any, are no longer necessary and can be repealed; which rules, if any, should be retained but amended; and which rules, should be retained as is. Identifying rules that could be repealed is the first priority.

Mr. Zicconi said he reached out to VTrans for input as many of the rules were promulgated prior to 1990 when the Board used to have policy making authority for the Agency. Being so old, many of the rules likely have been adopted by the Agency as formal policy and as a result the rules may no longer be necessary. After review, VTrans suggested that the Board retain one rule as is, modify two, retain one additional one for now as it is still be reviewed, and repeal six.

Rules VTrans advises repealing are:

- CRV 14 010 003
- CRV 14 010 006
- CRV 14 010 008
- CRV 14 010 013
- CVR 14 010 015
- CRV 14 010 018

Rules VTrans advises modifying are:

- CRV 14 010 004
- CRV 14 010 014

Rules VTrans advises retaining are:

- CRV 14 010 019

Rules VTrans advises keeping for now pending further review:

- CRV 14 010 017

Mr. Zicconi said he agreed with its assessment in each case, and recommend the Board agree to repeal the ones recommended and work to amend the ones recommended. Ms. Harrison questioned the recommendation regarding CRV 14 010 008, which spell out rules for Public Transit Subsidy Programs. She questioned it because VTrans response advising recommendation said that “almost” everything within the rule is not covered either in statute, grant agreements or other ways. Ms. Harrison said she wanted to know what was not covered somewhere else as she did not want any of the rules provisions to be lost. Mr. Zicconi said he would reach out to VTrans to get a better understanding of what “almost” means.

Mr. Zicconi said there were two other rules: CRV 14 010 009 and CRV 14 010 016 that he knows are no longer necessary as authority has either been transferred in statute or the rule has been codified within other VTrans’ procedures.

On a motion by Ms. Terry seconded by Ms. Harrison, the Board unanimously voted to inform VTrans that it supports repeal of CRV 14 010 003, CRV 14 010 006, CRV 14 010 009, CRV 14 010 013, CVR 14 010 015, CVR 14 010 016, and CRV 14 010 018.

Prior to the meeting, Board Attorney Ron Shems redrafted rule CVR 14 010 002, the general rules that are applicable to all proceedings before the Board. The Board generally liked the draft, and asked for a few minor changes. Mr. Shems said he would make those changes.

2.2 TB-462 Mather Airstrip

At 9:15 a.m. the Board on a motion by Ms. Harrison, seconded by Mr. Coen and approved unanimously entered into deliberative session, pursuant to Title 1 § 313, to discuss TB-462 Mather Airstrip in Panton, VT.

Mr. Zicconi and Mr. Shems were invited to join the deliberative session.

The Board exited deliberative session at 9:30 a.m.

2.3 TB-464 Kendall Station Road Southern RR Crossing

At 9:55 a.m. the Board on a motion by Ms. Terry, seconded by Mr. Bailey and approved unanimously entered into deliberative session, pursuant to Title 1 § 313, to discuss TB-464 Kendall Station Road Southern RR Crossing.

Mr. Zicconi and Mr. Shems were invited to join the deliberative session.

The Board exited deliberative session at 10:10 a.m.

Later in the meeting, Mr. Zicconi informed the Board that he has yet to receive an answer from the Town of Norwich to the Board's question regarding who owns the property adjacent to the tracks that in places is overgrown with brush? Mr. Coen asked the Board if there was anything short of ordering the Agency to install lights and gates that Board members wished to explore? The thought of installing a RR Crossing Ahead sign was raised, but no action was taken. The Board decided to table further discussion until it heard from the town. The Board also encouraged Mr. Zicconi to see if he could acquire photos of the improvements the town has already made on its own.

2.4 TB-457 Kendall Station Road Northern Crossing Closure Plan

At 11:15 a.m. the Board on a motion by Ms. Kittell, seconded by Mr. Hayward and approved unanimously entered into deliberative session, pursuant to Title 1 § 313, to discuss TB-457 Roback v. Washington County Rail Road.

Mr. Zicconi was invited to join the deliberative session.

The Board exited deliberative session at 11:30 a.m.

The Board after emerging from deliberative session reviewed the closure plan submitted on April 20, 2018 by Vermont Rail System and determined that no further action was necessary.

2.5 Fall Public Forums

At 11:50 a.m. the Board on a motion by Ms. Terry, seconded by Ms. Harrison and approved unanimously entered into executive session, pursuant to Title 1 § 313, to discuss a personnel issue.

Mr. Zicconi was invited to attend the executive session.

The Board exited executive session at 11:55 a.m.

Following the executive session, Mr. Zicconi advised the Board to postpone this fall's public hearings as extended medical leave is expected to keep the Lemon Law Administrator out of the office indefinitely. Mr. Zicconi will run the Lemon Law in the employee's absence, and as a result does not have the time to prepare for the hearings. The Board agreed. Ms. Terry suggested at its next meeting the Board discuss both the format and the future of its fall public forums.

3. OTHER BUSINESS

3.1 Round Table

Mr. Coen told the Board that he has asked the Vermont Public Utilities Commission to inform him of any filings and actions that occur related to the investigation the Commission has opened regarding the future of electric cars. The Board also agreed it would hold its next meeting on September 26, 2018.

4. ADJOURN

On a motion by Mr. Bailey seconded by Ms. Harrison, the Board unanimously voted to adjourn at 12:06 p.m.

Respectfully submitted,

John Zicconi
Executive Secretary

Next Board Meeting: September 26, 2018
